

MINUTES OF THE OPEN SESSION

OF THE RHODE ISLAND ETHICS COMMISSION

June 3, 2014

The Rhode Island Ethics Commission held its 8th meeting of 2014 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday June 3, 2014, pursuant to the notice published at the Commission offices, the State House Library, and electronically with the Rhode Island Secretary of State.

The following Commissioners were present:

Ross Cheit, Chair Mark B. Heffner*

Deborah M. Cerullo SSND, Vice Chair John M. LaCross

John D. Lynch, Jr., Secretary Edward A. Magro

Frederick K. Butler

Also present were Edmund L. Alves, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Jason Gramitt, Education Coordinator/Staff Attorney; Staff Attorney Amy C. Stewart; and Commission Investigators Peter J. Mancini and Gary V. Petrarca.

At 9:00 a.m. the Chair opened the meeting. The first order of

business was:

Approval of minutes of the Open Session held on May 13, 2014.

Upon motion made by Commissioner Lynch and duly seconded by Commissioner Butler, it was

VOTED: To approve minutes of the Open Session held on May 13, 2014.

AYES: John D. Lynch, Jr.; Frederick K. Butler; Ross Cheit.

ABSTENTIONS: Deborah M. Cerullo; John M. LaCross; Edward A. Magro.

The next order of business was:

Advisory Opinions.

The advisory opinions were based on draft advisory opinions prepared by Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date.

The first advisory opinion was that of:

Peter O'Rourke, a senior environmental scientist at the Rhode Island Department of Environmental Management ("DEM), requesting an

advisory opinion regarding whether the Code of Ethics prohibits him from applying for a permit from the Rhode Island Department of Environmental Management for a property that he co-owns.

Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was present. In response to Commissioner Butler, the Petitioner stated that he has no authority over granting these variances. He informed that a principal engineer, his direct supervisor and the Chief of Water Resources will review any variance applications as the Variance Review Board. He added that the membership of the board is fixed to those three (3) positions.

In response to Commissioner LaCross, Staff Attorney Stewart stated that the Chief of Water Resources represented that the permit with the two (2) variances is ready to be approved if this advisory opinion is granted. In response to Commissioner Cerullo, the Petitioner stated that he did not think of potential conflicts when he bought the property with his friend. He added that he knew that the property would need permits prior to any development, but he did not view such relief as unique because these types of variances are routinely granted for homes within 200 feet of the coastline.

*** Commissioner Heffner arrived at 9:15 a.m.**

In response to Chair Cheit, the Petitioner stated that DEM requested

additional information for these permits so many times, in his opinion, because he worked for DEM and they wanted to make sure everything was done properly. He added that there are specific standards that have to be met prior to granting these types of variances. Chair Cheit stated that he does not think that the Commission would have granted a hardship exception to this Petitioner under these circumstances if he had requested an advisory opinion prior to applying for the permit because it involves an investment property.

The Petitioner stated that he wrote to the Ethics Commission in January 2011. Senior Staff Attorney D'Arezzo replied that she responded to the Petitioner's January 2011 letter which was regarding filing a recusal statement and was not a request for an advisory opinion. She added that she advised him in her reply that it was unclear if he also was asking for an advisory opinion and he should contact the Commission if he wanted an advisory opinion.

Chair Cheit stated that he could not recall granting a hardship exception for an investment property, given that in investment situations the owner is not prohibited from selling the property. He added, however, that he takes the Petitioner at his word that the investment was entered into with good intentions. Commissioner Lynch stated that, similar to Chair Cheit, he had difficulty reconciling a hardship with an investment property and that he did not see a hardship in this case. Commissioner Magro agreed.

Commissioner Cerullo stated that this was a close case and she appreciated that the staff recommended granting the hardship exception, despite the Petitioner's prior communications with the Commission in 2011. In response to Commissioner Cerullo, the Petitioner stated that he has spent anywhere from \$2000 to \$4000 trying to get this permit from DEM, and he has yet to pay for his engineer's services. Commissioner Cerullo stated that from her perspective she is looking at whether there is a hardship today, deferring to the staff's understanding of the Petitioner's prior confusion about the advisory opinion process and the money he has invested since. Commissioner Lynch said that position could set a precedent where people would purposely delay coming before the Commission in order to argue a hardship based on the time and money already invested in a project. Chair Cheit agreed. The Petitioner stated that he would not sell the property without the necessary permits for residential development. He added that if he sold the property now, he would probably lose money. Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Magro, it was

VOTED: To issue an advisory opinion, attached hereto, to Peter O'Rourke, a senior environmental scientist at the Rhode Island Department of Environmental Management.

AYES: Deborah M. Cerullo.

NOES: John D. Lynch, Jr.; John M. LaCross; Frederick K. Butler; Mark B. Heffner; Edward A. Magro; Ross Cheit.

[Reporter's Note: Due to a lack of five (5) affirmative votes, the advisory opinion was not approved. No opinion will be issued.]

The next advisory opinion was that of:

Carmen Castillo, a member of the Providence City Council, requesting an advisory opinion regarding whether the Code of Ethics prohibits her participation and vote in the consideration of a proposed ordinance which would increase the minimum wage for Providence hotel employees, given that she is an employee of the Omni Providence Hotel.

Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was present. In response to Chair Cheit, the Petitioner stated that the ordinance would benefit many people in her community and not just herself. In response to Commissioner Cerullo, Staff Attorney Gramitt stated that prior advisory opinions have not set a minimum threshold size for a class. He added that this is class of approximately 1000 hotel workers and the Commission has granted class exceptions for classes as small as 100 people.

Chair Cheit commented on the first full paragraph on page three (3) of the draft opinion. He suggested that the 3rd sentence should track the language of the statute and state that the Petitioner will be affected to no greater extent than any similarly situated person in her class. Staff Attorney Gramitt stated that he would amend that sentence as instructed.

Commissioner Magro questioned why the ordinance singles out hotel workers among the many other minimum wage workers in the city of Providence. He suggested that the class is really a subclass of the City's minimum wage workers. Chair Cheit replied that the Commissioner Magro's point is well taken but addresses more of an equal protection argument about the limited scope of the ordinance. In response to Commissioner Heffner, the Petitioner stated that she was not the sponsor of this ordinance. Commissioner Butler stated that the merits of the ordinance are not before the Commission and it was the Commission's job to determine whether the Petitioner was a member of a significant and definable class. Commissioner Cerullo stated that the class exception always raises concerns but she acknowledged that the exception exists and these facts qualify for the exception. Chair Cheit replied that the class exception is necessary where legislators also maintain other employment. Upon motion made by Commissioner Butler and duly seconded by Commissioner LaCross, it was unanimously

VOTED: To issue an advisory opinion, as amended and attached

hereto, to Carmen Castillo, a member of the Providence City Council.

Commissioner Magro stated that he voted in the affirmative but maintained his reservations related to the limited scope of the ordinance.

The next advisory opinion was that of:

Lisa A. DiBello, a member of the Town Council of the Town of Charlestown, requesting an advisory opinion regarding whether she may accept private employment as a hot dog cart operator from an individual with whom the Town has entered into a food concession contract at the Town Beach.

Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was not present. Upon motion made by Commissioner LaCross and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Lisa A. DiBello, a member of the Town Council of the Town of Charlestown.

The final advisory opinion was that of:

W. Douglas Gilpin, Jr., FAIA, a member of the Town of New Shoreham Historic District Commission, who in his private capacity is an architect, requesting an advisory opinion regarding whether he qualifies for a hardship exception to the Code of Ethics' prohibition on appearing before his own board to help his client obtain a Certificate of Appropriateness.

Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was not present. Upon motion made by Commissioner Butler and duly seconded by Commissioner Heffner, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to W. Douglas Gilpin, Jr., FAIA, a member of the Town of New Shoreham Historic District Commission.

The next order of business was:

Legislative Update.

First, Staff Attorney Gramitt discussed the status of Senate Bill 2585 Substitute A – Quasi-Public Corporation Accountability and Transparency Act. He informed that he appeared before the Senate Government Oversight Committee to voice concern that the Bill instructs each board to develop its own code of ethics at least as

stringent as the Commission's Code of Ethics, but it does not state that the board members are subject to the Code of Ethics. He noted that the definitional section of the Code makes it clear that quasi-public corporations are subject to the Code. He informed that his comments were somewhat taken into account and the amended version of S2585 included language that all quasi-public corporations "shall comply" with the provisions of the Code of Ethics, as well as the Access to Public Records Act and the Open Meetings Act. Commissioner Heffner suggested that Staff Attorney Gramitt should testify when S2585 comes before the House for a hearing to suggest changing "shall comply" to "subject to" for additional clarity. Chair Cheit and Commissioner Cerullo agreed.

Second, Staff Attorney Gramitt discussed the status of Senate Resolution 2824 Substitute A – To Approve and Publish and Submit to the Electors a Proposition of Amendment to the Constitution of the State (Ethics Commission). He stated that S2824-SubA proposes restoring the Commission's jurisdiction over legislators but with an exception that would permit members of the general assembly to discuss and debate, verbally or in writing, any matter within their core legislative duties. He added that the Sub-A also increases the size of the Commission to eleven (11) members. He further noted that the Sub-A increases the level of scrutiny of judicial review on appeal from the fairly deferential Administrative Procedures Act standard to a trial de novo for anyone found in violation of any provision of the Code of Ethics. He informed that a prior version stated that everyone would

get a trial by jury. He stated that he testified before the Senate Judiciary Committee that jury trials can be very expensive for respondents filing an appeal and for the state, and such a heightened review for every case went well beyond what is constitutionally required. He informed that after his testimony there was an oral amendment to the S2824 Substitute A, which now reads “trial de novo,” including both bench and jury trials.

Staff Attorney Gramitt stated that the Sub-A was passed by the Senate Judiciary Committee and it is expected to go to the full Senate for a vote this week. Discussion ensued. Commissioner Heffner stated that he did not have a problem with a jury trial on appeal, given that few appeals are filed. He highlighted the fact that the restoration of the Ethics Commission’s jurisdiction over members of the legislature is in itself a major accomplishment if it prevails. He suggested that Staff Attorney Gramitt be prepared to provide examples of how the class exception is applied for the House hearings, noting the Advisory Opinion to Carmen Castillo approved today.

Chair Cheit stated that he agreed with Commissioner Heffner that the Commission should not oppose passage based on the level of judicial review. Staff Attorney Gramitt stated that it is still possible that the text of S2824 could be changed and the trial de novo issue narrowed, given some very intense criticism from other outside groups relating to jury trials on appeal. He stated that he would

continue to attempt to narrow the applicability of de novo review, but with the understanding that whatever the standard the most important thing is to get the issue of its jurisdiction before the voters.

The next order of business was:

Director's Report.

Executive Director Willever reported that there were four (4) advisory opinions, (1) complaint, and one (1) litigation matter pending. He stated that seven (7) APRA requests were granted since the last meeting, six (6) of which were completed within one (1) business day.

The next order of business was:

Executive Session.

At 10:35 a.m., upon motion made by Commissioner Cerullo and duly seconded by Commissioner Magro, it was unanimously

VOTED: To go into Executive Session, to wit: In re: William Reichert, Complaint No. 2014-1, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4).

The Commission reconvened in Open Session at approximately 10:39 a.m. Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Butler, it was unanimously

VOTED: To seal the minutes of the Executive Session held on June 3, 2014.

The next order of business was:

Report on Actions Taken in Executive Session.

Chair Cheit reported that the Commission unanimously voted to initially determine that the facts alleged in In re: William Reichert, Complaint No. 2014-1, if true, were sufficient to constitute a knowing and willful violation of the Code of Ethics, and authorized an investigation.

The final order of business was:

New Business.

Chair Cheit announced that he will be unable to attend the next meeting.

At 10:40 a.m., upon motion made by Commissioner Magro and duly seconded by Commissioner Butler, it was unanimously

VOTED: To adjourn.

Respectfully

submitted,

John D. Lynch, Jr.

Secretary